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No. 82-554

In the Supreme Court of the United States

OCTOBER TERM, 1982

JOHN E. McKENZIE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that there was prosecutorial misconduct before the grand jury that justified dismissing the indictment.

On July 9, 1981, a federal grand jury in New Orleans, Louisiana, returned a five-count indictment charging petitioners (seven New Orleans police officers) with beating or otherwise intimidating citizens in violation of federal law, in the course of the police department's investigation of the murder of a police officer in November 1980. The district court granted petitioners' motion to dismiss the indictment, finding that several of the prosecutors' comments and actions before the grand jury amounted to serious misconduct, which made a finding of actual prejudice to petitioners unnecessary (Pet. App. A-1 to A-23). The court of appeals reversed, holding that the indictment should be dismissed only if the prosecutors' conduct actually prejudiced petitioners by overbearing the will of the grand jury (*id.*

A-29); the court of appeals then found that only one of the complaints concerning the prosecutors' conduct was justified, and that single comment did not affect the grand jury's independence (*id.* at A-30 to A-34).

Petitioners contend (Pet. 10-12) that the court of appeals erred in ruling that they had not been prejudiced by the prosecutors' conduct. Whatever the merits of petitioners' contentions, they are not presently ripe for review by this Court. The court of appeals' decision places petitioners in precisely the same position they would have occupied if the district court had denied their motion to dismiss the indictment. If petitioners are acquitted following a trial on the merits, their claims will be moot. If, on the other hand, petitioners are convicted, they will then be able to present their contentions to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of a final judgment of conviction. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

OCTOBER 1982

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[1]Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.

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